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**From:**

**Sent:** Tuesday, August 24, 2010 4:33:06 PM

**To:**

**Cc:**

**Subject:** Pre-AJCA Section 6707 Questions

Below is our response to your pre-AJCA section 6707 questions.

I. You asked whether, based on the language of section 6671(b), the pre-AJCA section 6707(a)(1) penalty could be assessed against a person other than the person required to register the tax shelter under pre-AJCA section 6111 as a confidential corporate tax shelter.

The penalty under pre-AJCA section 6707(a)(1) is limited to those individuals who had a duty as tax shelter organizer under pre-AJCA section 6111(a)(1) to register a tax shelter, as the term "tax shelter organizer" is defined in § 6111(e)(1). Also, § 6111(d)(3) clarifies that, in addition to a "promoter" as that term is defined in 6111(d)(2)(B), persons other than a promoter may be required to register a confidential corporate tax shelter as provided in § 6111(d)(3). Therefore, in pre-AJCA section 6111, Congress specifically identified the individuals who were required to register a tax shelter under section 6111. See pre-AJCA § 6111(e) and (d)(3). The penalty for failure to register a tax shelter imposed by pre-AJCA section 6707(a)(1) is aimed only at those individuals who have failed to comply with pre-AJCA section 6111's registration requirements. Therefore, section 6671(b) may not be used to impose the pre-AJCA section 6707(a)(1) penalty on those persons who did not have an obligation to register the tax shelter under pre-AJCA section 6111.

II. You asked if the pre-AJCA section 6707 penalty is a divisible tax.

Divisible assessments are those taxes or penalties that are composed of several independent assessments created by separate transactions. Examples of divisible taxes are payroll and excise taxes. See Boynton v. United States, 566 F.2d 50, 52-53 (9th Cir. 1997); Flora v. United States, 362 U.S. 145, 171 n.37, 176 n.38 (1960). Pre-AJCA section 6707 provides that the penalty shall be: 1) the greater of one percent of the aggregate amount invested in the tax shelter or \$500 for 2:1 ratio tax shelters; or 2) the greater of 50% of the fees paid to all promoters of the shelter or \$10,000 for confidential corporate tax shelters. The penalty is not assessed on each individual transaction, like payroll taxes are, but instead are assessed based on the aggregate

amount invested in the tax shelter, or the aggregate amount of fees paid to promoters of the tax shelter. See Pre-AJCA § 6707(a)(2) and (3). Thus, pre-AJCA section 6707 penalties are non-divisible and must be paid in full before commencing a refund suit.

Section 301.6111-2T(e)(2)(i) as effective in T.D. 8961, provides that confidential corporate transactions involving similar business assets and similar plans or arrangements that are offered to corporate taxpayers by the same person or related persons are aggregated and considered part of a *single* tax shelter. Pre-AJCA section 6707 penalties are assessed on a tax shelter by tax shelter basis. Therefore, if multiple section 6707 penalty assessments are made against the same entity or individual, each assessment would involve different tax shelters. Thus, the assessed individual or entity could pay one pre-AJCA section 6707 penalty assessment and file a refund suit with respect to the paid penalty without paying the other assessments. The individual could not, however, litigate the merits of the unpaid penalty assessments in the refund suit.

Please let me know if you have additional questions.